STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2008
v	No. 276889 Wayne Circuit Court
FREDRICK ALLEN ROBINSON, Defendant-Appellant.	LC No. 06-008210-01

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 10 to 30 years in prison for the assault with intent to rob while armed conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues on appeal that there was insufficient evidence to prove that he assaulted Bobby Hollis with the intent to rob him. We disagree.

On review for insufficient evidence, this Court must determine if the evidence presented at trial was sufficient for a rational trier of fact to find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We review claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor. *Id.* We must defer to the fact finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

The elements of assault with intent to rob while armed, MCL 750.89, are: (1) an assault, (2) an attempt to rob, (3) while armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). It requires proof of specific intent to rob and steal, which may be inferred from the circumstances. *Id.*

Defendant argues that there was no evidence to show that he specifically intended to rob Hollis. Hollis and James Barnett, an eyewitness, both testified that defendant had a gun as he rushed to Hollis's car. Hollis was shot in the spine and permanently paralyzed. Either defendant or his compatriot demanded that Hollis get out of the car. A reasonable trier of fact could find,

based on this testimony, that defendant had the specific intent to rob Hollis of his car. *Akins*, *supra* at 554.

Defendant also argues that, because Hollis could not identify him, there was insufficient evidence to prove his identity in this case. He claims that he was at the store, but was an innocent bystander. Barnett, however, unequivocally identified defendant after first seeing him in the store and seeing him again during the assault. He also picked defendant's photograph from a lineup immediately. We must defer to the trial court's finding that Barnett's testimony was credible. *Fletcher, supra* at 561.

Defendant also argues that because the trial court acquitted him of assault with intent to murder on the basis that it could not determine who fired at Hollis, that he must necessarily be innocent of assault with intent to rob while armed. This argument has no merit. The identity of the person who actually fired on Hollis is not an element of this offense.

Defendant's second argument is that the trial court erred when it admitted evidence of the photographic lineup. We disagree.

Defendant first claims that he was denied his right to counsel at the time of the lineup. This issue was not raised at trial, and thus, is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Ordinarily, "in the case of photographic identifications, the right to counsel attaches with custody." *People v Kurlyczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Defendant admits that he was not in custody at the time of the photographic lineup. Defendant had been identified as a person of interest, but at the time of the lineup he was still in the hospital and had not been arrested or otherwise taken into police custody. Defendant claims, however, that he was "effectively" in custody at the time of the lineup.

This Court has recognized, on occasion, "unusual circumstances" in which a suspect may have a right to counsel when he is not in actual custody. *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000); see also *Kurlyczyk, supra* at 299. These circumstances must evince a situation where the "clear intent of the lineup [was] to build a case against the defendant." *Lee*, *supra* at 182. In the instant case, defendant was still a person of interest and not specifically a suspect in the case. The lineup was for the purpose of collecting the eyewitness identification as part of an ongoing investigation. These do not constitute "unusual circumstances" to merit an extraordinary right to counsel absent custody. *Lee, supra* at 182.

Relatedly, defendant argues that he should have been given the opportunity to appear in a live lineup. We disagree. We review this unpreserved issue for plain error as well. *Carines*, *supra* at 763.

If an accused is in custody or can otherwise be compelled to appear, a photographic lineup should not be given unless for a legitimate reason. *Kurlyczyk*, *supra* at 298. The mere ability to arrest a person, however, is not sufficient to establish that he or she may be compelled to appear for a live lineup. *Id*. at 298 n 8. Identification by photograph should be encouraged to "spar[e] innocent suspects the ignominy of arrest." *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968).

While the policy interest against arresting innocent suspects is not relevant here, because the police intended to arrest defendant as a person of interest, it was not plain error to admit this evidence. It is far from clear that defendant was physically able to appear for a live lineup. Further, he had not been arrested or otherwise contacted by police at that time. In fact, he was later discharged from the hospital without the knowledge of the police. Finally, it is in the interest of justice for the police to secure a timely identification from eyewitnesses. *Kurlyczyk*, *supra* at 298 n 8.

Defendant also objected to the admission of the photographic lineup on the basis that it was unduly suggestive. Defendant raised this issue in a pre-trial motion, so we review it on appeal for clear error. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

Defendant argues that his picture was tightly cropped around his face and yellow-tinged, drawing the viewers eye to his picture. The fairness of a photographic identification is judged in light of the totality of the circumstances to determine whether the procedure was so unduly suggestive that it led to a substantial likelihood of misidentification. *Kurlyczyk*, *supra* at 302; *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The Supreme Court, in *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972), stated:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation.

Further, differences in the composition of the photographs are not impermissibly suggestive. *Kurlyczyk*, *supra* at 304-305.

Here, Barnett made the lineup identification the day after the incident. His identification was immediate and certain. Barnett testified that he saw defendant once in the store prior to seeing him during the assault. The lineup was constituted with subjects possessing similar physical characteristics according to Barnett's description. None of the above factors suggests a substantial likelihood of misidentification. The only differences identified by defendant are in the composition of the photographs. Further, as the trial court noted, Barnett was given specific instructions to ignore such differences. The trial court had the opportunity to view the photographic array. There is no evidence that the trial court made any mistake in determining that the lineup was not unduly suggestive. Thus, the trial court did not clearly err in allowing the photograph identification to be admitted into evidence.

Defendant next argues that evidence of the circumstances surrounding his arrest was improperly admitted at trial on the grounds that the search of the house was made without a warrant.[1] We review a trial court's decision to admit evidence for an abuse of discretion. *People*

[1] On appeal, defendant also claims that he was arrested without a warrant. In fact, defense (continued…)

v Pattison, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.*

Defendant was found hiding in the attic of his girlfriend's house. At trial, the prosecutor elicited testimony that the arresting officer received consent from the girlfriend before searching her house. The trial court found that this was a valid consent. Defendant did not argue at trial and does not argue here that valid consent was not given. There was no need for a search warrant. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005).

Defendant last argues that the trial court improperly scored his sentencing guidelines. A trial court's scoring of the guidelines is reviewed to determine whether the court properly exercised its discretion and whether the evidence supports the scoring. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). A trial court's findings of fact are reviewed for clear error. *Id.* Questions of statutory interpretation are reviewed de novo. *Id.*

Defendant argues that he should not have been scored 25 points for Prior Record Variable 1 (high severity felony convictions), MCL 777.51(1), because he was assigned to youthful trainee status under MCL 762.10 (HYTA), for his prior offense. Under the HYTA, an assignment to the status of youthful trainee is not a conviction. MCL 762.14(2); see *People v Harns*, 227 Mich App 573, 575; 576 NW2d 700 (1998), rev'd in part on other grounds 459 Mich 895 (1998). The trial court erred when it ruled that defendant was to be scored 25 points for PRV 1 because he violated his probation for the previous offense. This is an erroneous conclusion of law. The probation violation is not dispositive on the question whether defendant's previous adjudication is a conviction subject to scoring under PRV 1.

However, the sentencing guidelines provide their own definition of a "conviction." MCL 777.50(4)(a)(i) specifically provides, "As used in this part: (a) 'Conviction' includes any of the following: (i) Assignment to youthful trainee status. . . ." "When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Thus, for purposes of the sentencing guidelines, the Legislature has included prior youthful trainee status as applicable to the scoring of PRVs. If the lower court reaches the right result for the wrong reasons, this Court will not reverse. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005). Defendant was properly scored 25 points for PRV 1.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

(…continued)

counsel conceded at trial that the police had an arrest warrant, and only argued regarding a search warrant. To the extent that defendant raises this issue on appeal, it is waived. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).